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Supreme Court of the United States

OCTOBER TERM 1957

PASQUALE PALERMO,

Petitioner,

—against—

LUCKENBACH STEAMSHIP COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PHILIP F. DI COSTANZO
Attorney for Petitioner
66 Court Street
Brooklyn, New York

ROBERT KLONSKY
On Petition

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To the Honorable the Chief Justice and Associates Justices of the Supreme Court of the United States:

Petitioner, Pasquale Palermo, prays that a Writ of Certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit filed July 5, 1957, reversing a final judgment entered in the United States District Court for the Eastern District of New York on May 8, 1956, upon a jury verdict before Galston, *J.*, awarding petitioner-plaintiff $65,000.00 for personal injuries sustained as a longshoreman aboard respondent's vessel on February 16, 1955.

The opinion of the Court of Appeals, made a part of the appendix to this petition, with a dissenting opinion by Chief Judge Clark, is not yet officially reported. The opinion of the District Court, by Galston, *J.*, denying defendant-respondent's motion to set aside the verdict and for judgment for the defendant notwithstanding the verdict, is set forth in full on pages 11A and 11B of the appendix for the respondent-defendant-appellant in the Court below.

Jurisdiction

The jurisdiction of this Court is based upon the provisions of 28 U. S. C. 1254(1). The judgment of the Court of Appeals reversing the judgment of the United States District Court for the Eastern District of New York was entered on July 5, 1957, having been argued January 11, 1957, decided July 8, 1957; Waterman, *C.J.* and Lumbard, *C.J.* for reversal and remand; Clark, *Chief J.* for affirmance.

Questions Presented

I.

Does the majority opinion introduce harsh common law principles long held by this Court to be inapplicable to maritime torts by reversing a jury verdict finding unseaworthiness in favor of a longshoreman?

Without citing a single case in support of its novel position, decisions in point all being to the contrary, the reversal is predicated on the reasoning set forth in the majority opinion that " . . . we do not think a ship, when it is tied to a pier, is unseaworthy if a safe route is provided to the plaintiff's place of work, and the plaintiff knowingly elects to forego that route for one that he has reason to believe is dangerous." This question is posed in the light of the following:

A. The petitioner and other witnesses testified that in fact both the starboard and port routes were dangerous, and that the route traversed by petitioner was that customarily used by all aboard ship while the vessel was in the process of discharging cargo. The hypothetical alternate route by using the thwartship passageway to the starboard side and then proceeding forward to where the No. 2 hatch was then discharging cargo had not been used by any person aboard ship during cargo operations.

B. The majority opinion cites *Hardie* v. *New York Harbor Dry Dock Corp.*, 9 F. 2d 545, 546 (2°Cir. 1925) in support of its erroneous proposition of law, although admitting that the issue of unseaworthiness was not there involved, and that Judge Learned Hand, who wrote the *Hardie* opinion, later explained it in *Lynch* v. *U. S.*, 163 F. 2d 97, 99, as follows:

> "... but I doubt that it would be safe to say that the mere existence of one safe way was always a complete exoneration. That depends, I think, upon the likelihood that the employees would not take the unsafe way; if there was a reasonable probability that they might do so, I think the shipowner's duty extends to reasonable care to see what dangers lurk in the other way, and to advise the employees of them."

The *Hardie* case, *supra*, concerned a wrongful death action under State law, not against a shipowner, on behalf of the estate of a ship repairer's employee, where contributory negligence was found and determined to be a complete bar.

On this, Chief Judge Clark dissenting herein wrote that the instant case required more than a mere warning, and in fact the duty to keep passageways seaworthy "is not satisfied by warning the users of defects and allowing them to find alternative routes."

C. Factually, the majority opinion of the Court of Appeals relies in great measure on the ship's log and the supercargo's memorandum book to show that the No. 3 hold was not worked between 6 P. M. and 9 P. M. on February 16th, and therefore two winchmen would not be blocking the thwartship passageway, and that there would be no danger from drafts being discharged over the starboard passageway from that hatch. Here again the Court below

invades the province of the jury and ignores these balancing facts:

(1) There is no proof in the record that petitioner or any other longshoreman knew that the cargo operations from No. 3 hatch, which had continued up to 6 P. M. as with all other hatches, would be discontinued during a period commencing at 7 P. M.

(2) In fact, cargo operations were resumed at No. 3 hatch at 2130 and it is reasonable to infer, particularly in the absence of any evidence to the contrary, that the No. 3 gang had not been dismissed from their stations between 7 P. M. and 9:30 P. M.

(3) The jury considered these facts and in the light of all the testimony resolved the conflict, if any, in favor of petitioner, as did the trial Judge on respondent's motions.

II.

Is there plain error in the admission by the majority that petitioner did prove dangers on the passageway proximately causing his grievous injuries but predicating reversal on the trial Judge's refusal to charge an erroneous proposition of law that would deprive a longshoreman of the comparative negligence doctrine and introduce instead the harsh common law defense of contributory negligence as a complete bar?

We are here concerned with a reversal predicated on a refusal by the trial Judge to charge that even where the passageway on which petitioner walked was unseaworthy and was hurt thereby, that nonetheless there can be no recovery for grievous injuries if the longshoreman knew or should have known that the passageway on which he was walking was unsafe and that there was an alternative safe passageway on which he could have proceeded.

It is apparent from a reading of the final paragraph of the majority opinion that remands for another jury to "determine, *inter alia*, the relative risks presented by the two alternative routes to the plaintiff's place of work and the plaintiff's knowledge of a substantial difference in those risks, if such existed, at the time he elected to go by the starboard passageway," that the majority was applying as a test for unseaworthiness the same considerations that could only apply to the defense of contributory negligence. What petitioner might have known about the risks is no more than a question of contributory negligence. The majority opinion recognizes that "assumption of risk" should not be applicable. We respectfully submit the law to be that a passageway not fit for its purpose (without illumination and covered in part with grease) renders a vessel unseaworthy regardless of the possible existence of a safe alternative passageway, and whether known or unknown to a longshoreman.

The text of the crucial request, and the irrefutable analysis by the Chief Judge in his dissent, are set forth in the dissenting opinion as follows:

(Request to Charge)

"12. Even if you should find that Mr. Palermo was hurt because the passageway on the port side of the deck housing was unsafe and that the unsafe condition caused the ship to be unseaworthy or resulted from the negligence of the Steamship Company, I charge you as a matter of law that Mr. Palermo is not entitled to any money from the defendant if there was a safe passageway on the starboard side of the deck housing which he could have used and if Mr. Palermo knew or ought to have known that fact and nevertheless voluntarily chose to use the port passageway."

(Part of Analysis by Chief Judge Clark)

"This proposed instruction stated the law incorrectly and there was no error in rejecting it. First, the instruction was an attempt to introduce assumption of risk into the case. It makes no sense any other way. For if its theory was contributory negligence, it wrongly allowed the jury to defeat all recovery, instead of merely reducing it. If its theory was to provide a particular application of negligence or seaworthiness, it was confusing, for it started from the premise that the jury had already resolved these issues in favor of the plaintiff. It thus forces a compulsion of choice on the plaintiff which neither the facts nor the law justifies" (p. 30 of appendix to petition).

III.

Can a general verdict in favor of a longshoreman who had proven grievous injuries proximately caused by unseaworthiness and the shipowner's failure to provide him with a reasonably safe passageway, which he and others customarily used, be reversed on the harsh common-law doctrine of assumption of risk?

Where there is a general verdict in a maritime cause predicated on a shipowner's breach of the warranty of seaworthiness, and there is an appropriate charge on comparative negligence and the diminution of damages to the extent of petitioner's contribution to the accident, there is plain error when the Court of Appeals states that the doctrine of assumption of risk would not be applicable and then to erroneously apply this doctrine, as pointed out in the dissenting opinion for "it makes no sense any other way," and ". . . their result in substance rests on that analysis; they support their decision by cases turning on

that doctrine; and the error which they find is a failure to instruct the jury on that doctrine" (dissenting opinion, pp. 27, 30 of appendix to petition).

IV.

Should not certiorari be granted in the exercise of this Court's power to afford proper supervision of the federal judiciary and correct plain error in response to the strongly expressed concern of Chief Judge Clark of the Court of Appeals, dissenting herein, as to " . . . a growing tendency in this court to upset awards in jury cases"?

The majority opinion concedes there was "conflicting testimony" on the crucial issue of whether petitioner-longshoreman was afforded a safe alternative passageway, and reversed and remanded for a new trial without dismissal of the complaint because "The evidence below is too conflicting on several crucial questions of fact." It was error for the Court of Appeals to reverse a final judgment, predicated on the jury verdict resolving this conflict in favor of petitioner, and remanding for another jury's determination on the same issue of fact. This question is posed in the light of the following:

A. Chief Judge Clark dissenting herein wrote:

> "I have had occasion recently to express my concern at a growing tendency in this court to upset awards in jury cases—today's decision continues that trend, adding some new curiosities" (p. 27 of appendix to petition).

B. The record clearly shows that the passageway on which the accident occurred was not fit for its purpose, admitted by the majority opinion, and that the hypothetical

alternate route proposed by respondent and rejected by the jury presented even greater dangers of cargo gear and drafts in operation from the starboard side to the shore.

C. The jury was clearly charged as to respondent's contention that "The defendant urges that if plaintiff knew there were grease spots on the port side in the passageway leading to hatch 3 (*sic*), why, he should have used the starboard. . . . " This was rejected by the jury and its verdict fortified by the opinion of Galston, *D.J.*, in denying all motions directed against the verdict.

V.

As a matter of law, did the Court of Appeals err by reversing a jury verdict which is fortified by the exercise of discretion by the trial Judge who refused to grant defendant's motions, which discretion is supported by the record herein?

Statement of the Case

Petitioner was employed by an independent contractor as a longshoreman in the capacity of a hatch foreman on February 15 and 16, 1955, aboard respondent's S. S. Marine Snapper. On February 16, 1955, at about 7:05 P. M., following a supper break, while proceeding on the port passageway to join his men already working in the after part of the No. 2 hatch, he was caused to slip, trip and fall over an obscured sill across the passageway by reason of grease from a nearby winch and the absence of any illumination where he and other longshoremen customarily walked while cargo was being discharged on the opposite or starboard side.

At the time of the accident the working hatches were actually discharging cargo. The No. 3 hatch had been discharging cargo with the other hatches to 6 P. M. and had

ceased operations until 9:30 P. M. the same day, as appears in respondent's log and supercargo memorandum book. There is no evidence that petitioner or any other longshoreman knew that the No. 3 hold would not resume the discharge of cargo commencing at 7 P. M. as it had been discharging up to the time of the supper break.

At the place of the accident there was grease on the passageway related to a nearby winch drum, located about a foot away from the port passageway leading to the No. 2 hatch. The winch drum had been greased and oiled by members of the ship's crew and the runners had been covered with grease by means of a mop-like brush dipped into a pail. The location of these grease spots was described by a witness as "all around that deck," "grease spots on that deck." (See pages 2a to 7a, 10a, 28a of plaintiff's appendix below.)

Further, the area was dark by reason of burned out light bulbs, described in the ship's log as "bulkhead lights out, two. Electrician replaced," which entry was made after the accident. (See pages 11a, and 14a of plaintiff's appendix below.)

As regards the starboard passageway which respondent successfully urged below as an "alternative safe passageway," it was described by another hatch boss, Guarracino, a few steps ahead of petitioner when he slipped and fell over the sill, as being unsafe. He testified "It is safer to walk on the portside, because on the starboard side the drafts are coming out of the different hatches." He explained this danger by pointing out that the discharge operation was already in progress from all hatches over the inshore or starboard side, as all gangs had preceded the hatch bosses aboard by about 10 to 15 minutes, emphasizing that he and the petitioner had used the port passageway as "we always go on that side, that is a safety

measure that we take." Respondent's witness Purcell, a super cargo clerk, admitted that he himself used the port passageway during cargo discharge on the starboard side because it was safer (p. 26a of plaintiff's appendix below).

Petitioner testified that he slipped and while attempting to balance himself, tripped over the sill. As he fell the weight of his body went on his outstretched right hand, he being right handed. As he slipped he felt "something smooth, fast," underfoot. The exact words recorded in the ship's log were: "Patsy Palermo, hatch boss No. 2 after gang tripped and fell, injured right elbow and hand. He tripped on treadle by bridge house . . ." (pp. 14a, 16a of plaintiff's appendix below).

At the time of the accident petitioner was 45 years of age, earning between $75 and $100 per week. He has not worked since the date of the accident.

The Columbus Hospital record discloses plaintiff sustained "fracture and dislocation, comminuted, extensive of right elbow involving olecranon, and upper shaft and coronoid process and head of upper shaft of radius." In addition there is noted several small shaft fragments in the elbow, and irregularity of the head of the radius, and a posterior lateral dislocation at the elbow joint (p. 17 of plaintiff's appendix below).

Dr. Mario F. Tagliagambe, the surgeon who operated for 3 hours to unsuccessfully reduce the fractures, testified that additionally "there were a lot of joint disruptions, both in ligaments and capsule form," a great deal of fluid in the elbow joint, and there was inserted permanently two screws and one circular wire. After discussing the deformity with marked restriction, atrophy "very little flexion and very little extension from this fixed position," with the failure of the operation to allow a maintenance of a proper position, the doctor concluded that the extremity is almost

ankylosed by reason of bony block and soft tissue block, so that he has close to the 100 per cent level of permanent disability preventing him from ever returning to his work as a longshoreman, regardless of any arthrodesis operation that may subsequently be performed. (See pages 20a to 24a of plaintiff's appendix below.)

Dr. David J. Graubard, another medical witness for the plaintiff, described plaintiff's condition and stated that at the time of trial, 13 months since the accident, "there has been no union, no callus and the thing has refused to heal," demonstrating "a complete destruction of the entire elbow joint with a loss of the head of the radius here and with the destruction of the ulna." He described the arm as "absolutely valueless" with "100 percent loss of function of the entire right upper extremity—and this man is right-handed" (pp. 24a to 25a of plaintiff's appendix below).

Though plaintiff had been examined by a Dr. Balensweig on behalf of the defendant, said doctor was not called to offer any medical testimony to contradict plaintiff's medical experts. In fact, defendant's trial counsel admitted in summation that the plaintiff "did have a bad break," and that there is no serious dispute about the arm (pp. 28a and 29a of plaintiff's appendix below).

With respect to the use of the alternate passageway, the trial Court's charge to the jury contains the following passage:

> "The defendant urges that if the plaintiff knew there were grease spots on the port side in the passageway leading to hatch 3, why, he should have used the starboard; to which plaintiff responds that that would not have been a wise move because the unloading was in progress to the shore, the winches were in operation and that the unobstructed passageway was on the port side" (p. 7a of defendant's appendix below).

Jurisdiction in the Court of first instance was based on diversity of citizenship and that damages exceeded the jurisdictional amount of $3000.00.

The jury verdict in the amount of $65,000.00 was general on causes of action for unseaworthiness and negligence in failing to afford petitioner a safe place to work. All motions directed against the verdict were denied by the trial Judge in a memorandum opinion stating liability and substantial damages were proven. Reversal by the Court of Appeals was solely predicated on the trial Judge's refusal to charge the request set forth in Question II, *supra*.

Reasons for Granting the Writ

1. The majority decision is in conflict with all controlling decisions of this Court to the effect that a longshoreman does not assume the risk of an unsafe place to work or the breach of a shipowner's continuing and non-delegable obligation of seaworthiness. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 872; *Pope & Talbot* v. *Hawn*, 346 U. S. 406, 74 S. Ct. 202; *Mahnich* v. *Southern SS Co.*, 321 U. S. 96, 64 S. Ct. 455. Instead, the only decision the majority opinion cites in which the presence of a better alternative route allegedly defeated recovery for unseaworthiness is the unappealed lower Court decision of *Manera* v. *U. S.*, 124 F. Supp. 226, which is discussed in the latter portion of the dissenting opinion below as really not at all concerned with a choice between a seaworthy and unseaworthy ladder.

2. As the controlling decisions hold that there is no distinction as to liability between an injury to a longshoreman proximately caused by unseaworthiness while the vessel is tied to a pier, and to a seaman while the vessel is at sea, then the principle of *Socony-Vacuum Co.* v. *Smith*, 305 U. S.

424, 59 S. Ct. 262, that assumption of risk is not a defense with respect to use of a defective appliance when the plaintiff chose to use an unsafe appliance instead of a safe method which was known to him, must necessarily apply to compel reinstatement of the final judgment in the district Court. This Court held in the *Socony-Vacuum Co.* v. *Smith* case, *supra,* that under such circumstances conduct formerly labeled "assumption of risk" was to be "applied in conjunction with the established admiralty doctrine of comparative negligence and in harmony with it" (p. 429 of 305 U. S.).

Both the majority and dissenting opinions by this Court in *Pope & Talbot* v. *Hawn, supra,* have established clearly that a longshoreman is owed a warranty of seaworthiness by reason of doing work historically performed by seamen, so that vis-a-vis the vessel he is free of the common law defenses erroneously applied by the Court of Appeals herein. The sense of the majority opinion below is that federal maritime law does not control. We respectfully submit this is plain error.

Though the Court of Appeals herein seemingly holds to the contrary, it must be that whether a vessel is tied to a pier or is at sea, or whether the injured person disabled by unseaworthiness is a longshoreman or a crew member, the culpable shipowner is not relieved of its continuing and non-delegable obligation of seaworthiness. This has been clarified and established in decisions emanating from this Court subsequent to the "assumption of risk" and "negligence" cases cited in the opinion below. In point is what this learned Court stated in the *Hawn* case, *supra,* where the warranty was extended to a carpenter, as follows:

> "His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of the seamen who

had been or were about to go on a voyage. All were subjected to the same danger. All were entitled to like treatment under law" (p. 207 of 74 S. Ct.).

In the instant case there was a charge on comparative negligence and mitigation of damages should the jury determine that petitioner's fault contributed to the accident, and in fact, the burden on plaintiff was even more strict than the law requires as the charge stated "of course the burden is on the plaintiff to show that he was free from contributory negligence" (p. 7a of defendant's appendix below).

3. Not only is the majority opinion in conflict with decisions emanating from the United States Supreme Court recited above, and fails to cite a controlling case to support its novel and discredited basis for reversal, it is also in conflict with the Court of Appeals for the Ninth Circuit in the case of *Pacific Far East Lines, Inc.* v. *John Williams,* 234 F. 2d 378, where on facts similar to those in the case at bar it was held that the jury was not unwarranted in finding unseaworthiness or negligence or both. As the only basis on which the instant reversal can be understood is the application of the discredited principle of "assumption of risk," there is also conflict with the Court of Appeals for the Sixth Circuit in the case of *Imperial Oil, Ltd.* v. *Drlik,* 234 F. 2d 4, 9, where that Court held assumption of risk could not be a defense to an action by a dock crew man, and that contributory negligence, however gross, is not a bar to recovery, but only goes to mitigate damages.

The ambiguity and confusion in the phrase "assumption of risk" is discussed by Mr. Justice Frankfurter in his concurring opinion to *Tiller* v. *Atlantic Coast Line R.R.,* 318 U. S. 54, 63 S. Ct. 444, 452, and in *Owens* v. *Union Pac. R.R.,* 319 U. S. 715, 720, 63 S. Ct. 1271, 1274, Mr. Justice Rutledge stated: "and assumption of risk took over also,

in misguided appellation, large regions of the law of negligence. What in fact was absence from departure of due care by the defendant came to be labelled 'assumption of risk.'"

4. The Court below erroneously applies the principles of shore-side negligence to a maritime tort concluded by a unanimous jury verdict and fortified by a trial Judge's denial of all motions wherein the general verdict embraced a finding of a breach of a shipowner's non-delegable and continuing obligation to provide petitioner with a seaworthy passageway, admittedly unseaworthy and proximately related to his grievous and permanent injuries by the very request to charge which is the basis of the reversal. The district Court's final judgment in the amount of $65,000.00 in favor of a 45 year old hatch boss who has a useless right extremity forever precluding him from doing any work of the nature he knows, with the injuries admitted by respondent in its decision not to call a doctor to rebut any of the medical testimony clearly demonstrating the total permanency and petitioner's inability to return to work, should not have been disturbed on the basis of a defective and clearly erroneous request to charge on the discredited principle of "assumption of risk."

5. The reversal by the Court of Appeals is also in conflict with the recent decision of this learned Court in *Neese v. Southern Railway Company*, 350 U. S. 77, 76 S. Ct. 131, reversing 216 F. 2d 772, wherein it was held error for the Court of Appeals to reverse a district Judge who denied a motion for a new trial where the action of the district Judge was not without support in the record.

6. The decision of the Court of Appeals herein, reversing the judgment for petitioner, is predicated on error and is the concern of the Chief Judge of said Circuit as dem-

onstrating a "growing tendency in this court to upset awards in jury cases." This Honorable Court should grant certiorari so that there be proper supervision of the federal judiciary as to the purpose and function of a jury trial, as was recently expressed by this Court in *Ferguson* v. *Moore-McCormack Lines, Inc.*, 77 S. Ct. 457, wherein *Wilkerson* v. *McCarthy*, 336 U. S. 53, 62, 69 S. Ct. 413, 418, was cited to the following effect:

> "Courts should not assume that in determining these questions of negligence juries will fall short of a fair performance of their constitutional function."

The strongly justified concern of Chief Judge Clark, corroborated by the record herein, is apposite to this Court's recent ruling, as to when petitions would be granted, in *Rogers* v. *Missouri P. R Co.*, 1957, 352 U. S. 500, 77 S. Ct. 443, 451, as follows:

> "Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination."

7. The instant decision of the Court of Appeals would defeat and abort in any re-trial of this case and all future cases to which it would be cited as authority, the prior decisions of that Court, as well as those of this Court with respect to the warranty of seaworthiness and the abrogation of the harsh common law defense of assumption of risk and contributory negligence as complete bars. By the instant decision the Court of Appeals has assailed major principles of law on which liability for maritime accidents had heretofore been determined, and defeats liability based on *admitted* unseaworthiness proximately related to injuries by an interference with a jury's function of determining facts, merely on the conflicting evidence as to whether there

was another passageway available which would not have been as dangerous. This reasoning can be applied to "alternate" gear, equipment and appurtenances to defeat recovery for unseaworthiness in any future maritime accident.

WHEREFORE, petitioner respectfully prays that a writ of certiorari should be granted and that this Court reverse the Court below and reinstate the original judgment of the district Court entered substantially more than a year ago, inasmuch as the decision of the Court of Appeals is so clearly erroneous as to make argument unnecessary before this Honorable Court, or any other relief as the Court may deem just and proper.

PASQUALE PALERMO, *Petitioner*

By: PHILIP F. DI COSTANZO, *Attorney*

Dated: Brooklyn, New York

July 1957

ROBERT KLONSKY

On Petition

APPENDIX TO PETITION

OPINION

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 119—October Term, 1956.

(Argued January 11, 1957 Decided July 8, 1957.)

Docket No. 24245

PASQUALE PALERMO,

Plaintiff-Appellee.

—v.—

LUCKENBACH STEAMSHIP COMPANY, INC.,

Defendant-Appellant.

Before:

CLARK, *Chief Judge,* and
LUMBARD and WATERMAN, *Circuit Judges.*

Plaintiff, a longshoreman, obtained a jury verdict in the Eastern District of New York against defendant shipowner for injuries sustained while cargo was being discharged from defendant's ship. From judgment entered thereon, Galston, *J.*, defendant appeals. Reversed and remanded.

PHILIP F. DICOSTANZO, Brooklyn, N. Y. (Robert Klonsky, New York City and Thomas J. Livornese, of counsel) (and on brief), *for plaintiff-appellee.*

BURLINGHAM, HUPPER & KENNEDY (Eugene Underwood, William M. Kimball, of counsel), New York City, *for defendant-appellant.*

WATERMAN, *Circuit Judge*:

The defendant, Luckenbach Steamship Company, appeals from a judgment below entered upon a jury verdict awarding the plaintiff, Pasquale Palermo, $65,000 damages for personal injuries sustained while he was working as a longshoreman on a ship owned and operated by the defendant. The complaint alleged that the injuries were caused by the defendant's negligence in failing to provide the plaintiff with a reasonably safe place to work, and by the unseaworthy condition of the defendant's steamship, the *Marine Snapper*.

The evidence adduced at the trial tended to establish the following facts: On February 15 and 16, 1955, the plaintiff was employed by Turner & Blanchard, Inc., a stevedoring concern engaged in the unloading of the *Marine Snapper*. Palermo was in charge of a hatch gang that was unloading cargo from the aft part of the No. 2 hatch. The ship lay starboard to the 35th Street Pier, Brooklyn, and was discharging cargo on that side.

At 6:00 P. M. on February 16, the longshoremen, including the plaintiff, left the ship for "lunch." At 7:00 P. M. they again boarded the vessel, Palermo delaying a minute or two on the pier to make sure that all his men had returned to work.

The *Marine Snapper*, a C-4 cargo vessel, has a raised forecastle deck on which are located the forward deck house and Nos. 1 and 2 hatches. The gangway was aft at the lower level of the well deck. After boarding on the starboard side, Palermo crossed over to the port side and

proceeded forward. He climbed the ladder to the forecastle deck, and then entered the port passageway, which ran between the deck house and the port rail. At the end of the passageway, flush with the forward end of the deck house, was a three-inch sill on the deck. At approximately 7:05 P. M. the plaintiff tripped on the sill and fell forward to the deck, thereupon sustaining the severe and disabling injuries to his elbow and right arm for which he here sought recovery. Palermo testified that as he approached the sill, he slipped on some oil or grease that had accumulated on the deck after a nearby winch drum had been greased by members of the ship's crew. He also testified that the two nearest bulkhead lights were off, and that the port passageway was very dark. This latter statement was corroborated by the testimony of another hatch boss who had preceded Palermo through the passageway.

On cross-examination the plaintiff testified that prior to his accident he knew that there was grease on the deck of the port passageway and that the bulkhead lights which normally illuminated that area were out. Indeed, he had called the latter fact to the attention of one of the crew members when he left the ship at 6:00 P. M., since it was already dark at that hour.

There was further evidence that the plaintiff, after mounting the ladder to the forecastle deck, could have recrossed the ship to the starboard side by means of a three-foot thwartships passageway directly abaft the deck house, and could then have proceeded forward to his place of work through the starboard passageway, which was sufficiently lighted. Since the plaintiff's hatch gang was working on the starboard side of the ship, it appears that this route would have been no longer than the one chosen by Palermo.

There was conflicting testimony, however, as to the difficulties or dangers posed by this route. One witness for

the plaintiff testified that both holds No. 2, which was forward, and No. 3, which was on the well deck just aft of the forecastle, went into operation promptly at 7:00 P. M., and that anyone thereafter walking along the starboard side might have been hit by drafts being discharged from those hatches, or might have encountered winch grease, coils, or other equipment in operation. Also, if No. 3 hold was being worked, two winchmen would be located in the thwartships passageway abaft the deck house, thus tending to impede travel by that route. However, the ship's log and the supercargo's memorandum book indicated that the No. 3 hold was not worked between 6:00 P. M. and 9:00 P. M. on February 16.

Both the port and starboard passageways, as well as the passageway directly abaft the deck house, were covered, and thus protected from unloading operations. Running across the forward end of the deck house was a narrow platform raised about two feet off the forecastle. This platform was protected from above by the edge of the bridge.

On appeal the defendant argues that the trial court erred (1) in refusing to charge the jury that the plaintiff was not entitled to any recovery if he voluntarily chose to use a passageway known by him to be unsafe and if there was another available passageway known by him to be safe; and (2) in denying the defendant's motion after trial to set aside the verdict for excessiveness.

We believe that the court below, in refusing to give the requested charge,[1] committed reversible error, and we are therefore remanding this case for a new trial. In view of this disposition, it is unnecessary to discuss the appellant's second contention.

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1 The charge requested by defendant that the Court did not submit to the jury and the charge on this point that the Court gave are each quoted in full in the body of the dissenting opinion.

Judge Learned Hand, writing for this court, said in *Hardie* v. *New York Harbor Dry Dock Corp.*, 9 F. 2d 545, 546 (2 Cir. 1925), a suit for negligence by the administratrix of the estate of a machinist's helper against the intestate's employer, a ship repairer: "If there be two ways, one safe and the other dangerous, the servant chooses the dangerous way at his peril, if the difference is known to him." A few years later, in a negligence action by a harbor worker against the shipowner, this court, relying on *Hardie*, held that "There is no duty to keep a dark way safe if a light way is provided." *Long* v. *Silver Line, Ltd.*, 48 F. 2d 15, 16 (2 Cir. 1951).

In the ensuing years this court, even when the defendant appeared to have been negligent, applied the doctrine of assumption of risk on several occasions to deny recovery to seamen who sued the shipowner for injuries sustained while on board but at a time when the plaintiffs were not technically "on duty." See, *e.g.*, *Holm* v. *Cities Service Transp. Co.*, 60 F. 2d 721 (2 Cir. 1932); *Johnson* v. *United States*, 74 F. 2d 703 (2 Cir. 1935). Subsequently, in *Socony-Vacuum Co.* v. *Smith*, 305 U. S. 424 (1939), the Supreme Court held that assumption of risk was not a defense in a suit brought by a seaman under the Jones Act to recover for injuries resulting from his use, while "on duty," of a defective appliance of the ship when the plaintiff chose to use the unsafe appliance instead of a safe method which was known to him. The Court declared that under such circumstances conduct formerly labeled "assumption of risk" was to be treated as only contributory negligence, and thus could be considered only in mitigation of damages. The role of the assumption of risk doctrine in cases where the seaman's injury occurred while he was "off duty" was expressly left open.

In *Wong Bar* v. *Suburban Petroleum Transport, Inc.*, 119 F. 2d 745 (2 Cir. 1941), this court reaffirmed its ad-

herence to the rule set out in the *Holm* case, and stated that assumption of risk was a defense, under the Jones Act, when a seaman's injury resulted from the knowing choice of a defective appliance when a safer one was available, if the injury occurred when the plaintiff was not on duty. The rationale underlying this distinction apparently sprung from an appreciation of the substantially increased, and somewhat unique, pressures under which a seaman works while he is on duty. The application of this rationale has been rendered extremely difficult, if not impossible, however, by the recent rapid development of the law in the area of maritime torts.[2] Be that as it may, despite the attempt of the plaintiff to commingle the reasoning of the *Hardie* case with that of the *Holm* decision, we emphasize that in deciding this case we are *not* invoking assumption of risk principles, nor are we applying a rule whose applicability depends upon the distinction between "on duty" and "off duty."

It seems clear that the *Hardie* rule, albeit qualified, has retained its vitality in cases where the action sounds solely in negligence. In *Lynch* v. *United States,* 163 F. 2d 97 (2 Cir. 1947), decided prior to the *Hawn* extension of the unseaworthiness doctrine to harbor workers other than stevedores, Judge Learned Hand, in a concurring opinion, 163 F. 2d at 99, explained his earlier decision:

> "In *Hardie* v. *New York Harbor Dry Dock,* we held that, if there was a safe way provided for an employee

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2 For example, the availability of the doctrine of unseaworthiness, traditionally limited to seamen, was extended to stevedores in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946), and then to other harbor workers in *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406 (1953). In addition, the doctrine itself was transformed from a duty to use *due diligence* to provide a seaworthy ship to an *absolute* duty to so provide. See, *e.g.*, *Seas Shipping Co.* v. *Sieracki*, *supra*, and *Mahnich* v. *Southern S.S. Co.*, 321 U. S. 96 (1944). See generally Gilmore & Black, The Law of Admiralty, §§6-38 to 6-44, 6-55 (1957).

> of a contractor, and he chose an unsafe way, the owner was absolved. That was right, as applied to the facts of that case, but I doubt that it would be safe to say that the mere existence of one safe way was always a complete exoneration. That depends, I think, upon the likelihood that the employees would not take the unsafe way; if there was a reasonable probability that they might do so, I think the shipowner's duty extends to reasonable care to see what dangers lurk in the other way, and to advise the employees of them."

Of course, if the plaintiff was already aware of the danger lurking in his chosen course prior to his injury, the shipowner owed him no duty of warning. *Long* v. *Silver Line, Ltd.*, 48 F. 2d 15, 16 (2 Cir. 1931).

The *Hardie* case was recently quoted and relied upon by Judge Weinfeld in a wrongful death action based upon the defendant shipowner's alleged negligence in failing to provide the decedent stevedore with a reasonably safe place to work. *Grenawalt* v. *South African Marine Corp.*, 130 F. Supp. 432 (S. D. N. Y. 1955), *aff'd*, 243 F. 2d 575 (2 Cir. 1957). It is our belief, moreover, that the *Hardie* rule is applicable even in actions where the plaintiff sues for a breach of the shipowner's implied duty to maintain his ship in a seaworthy condition. That is, we do not think a ship, when it is tied to a pier, is unseaworthy if a safe route is provided to the plaintiff's place of work, and the plaintiff knowingly elects to forego that route for one that he has reason to believe is dangerous. Support for our position can be found in a recent District Court decision. *Manera* v. *United States*, 124 F. Supp. 226 (E. D. N. Y. 1954). *Cf. Bohannon* v. *United States*, 92 F. Supp. 700 (S. D. N. Y. 1950) (where a similar result was supported by reliance on the "assumption of risk" cases mentioned above).

However, on the basis of this record we cannot direct the entry of judgment for the defendant. The evidence below is too conflicting on several crucial questions of fact, the resolution of which must be left to the jury. Thus, although it seems clear that Palermo was aware of the dangers inherent in the unlighted port passageway, it is less clear that the thwartships and starboard passageways presented a safe and easily traversible route to the plaintiff's place of work at the No. 2 hatch. For example, the defendant contends that there could have been no winchmen in the thwartships passageway abaft the deck house at 7:05 P. M. because the Nos. 3 and 4 holds were not being worked at that time. The plaintiff, on the other hand, claims that two winchmen were located in the passageway just prior to the accident, and that their presence would have impeded travel by that route. The plaintiff also argues that he would have been exposed to the perils incident to discharging operations on the starboard side if he had proceeded forward to his place of work on that side of the ship. This assertion was met below by the defendant with evidence that only holds No. 1 and No. 2 were in operation at the time of plaintiff's injury. The defendant also points out that the plaintiff was the boss of the hatch gang working at the aft end of the No. 2 hatch, and "if, upon reaching the forward end of the starboard passage he had found a draft of cargo swinging in such a way as to endanger his going further forward, he could have either waited or, as hatch boss, directed the suspension of work until he reached the place he desired to reach." With less force, the defendant also argues that the plaintiff could have used the narrow, but protected, platform along the forward end of the deck house in any emergency.

Hence at a new trial it will be necessary, under instructions from the court in accord with the principles outlined above, for the jury to determine, *inter alia*, the relative

risks presented by the two alternative routes to the plaintiff's place of work and the plaintiff's knowledge of a substantial difference in those risks, if such existed, at the time he elected to go by the starboard passageway.

Reversed and remanded.

CLARK, *Chief Judge* (dissenting):

I have had occasion recently to express my concern at a growing tendency in this court to upset awards in jury cases. See *Kermarec* v. *Compagnie Generale Transatlantique*, 2 Cir., May 21, 1957. Today's decision continues that trend, adding some new curiosities. Thus my brothers find reversible error in the trial judge's failure to give a particular requested charge, but they never quote the request or the charge actually given. They next repudiate any suggestion that they would use the anachronism of "assumption of risk," whose shifting meanings we recently discussed in *Sanderson* v. *Berkshire-Hathaway, Inc.*, 2 Cir., June 17, 1957. But their result in substance rests on that analysis; they support their decision by cases turning on that doctrine; and the error which they find is a failure to instruct the jury on that doctrine. Lastly, their general discussion seemingly points to a directed verdict for the defendant until they ultimately shy from so drastic a ruling and rest the forced retrial upon the judge's rejection of what is, to say the least, a highly dubious formulation of law. I do not find in all this a sound reason for disturbing the jury's verdict and the court's judgment.

Turning to the crucial issue, there was a factual dispute concerning the relative safety of the route which the plaintiff took and a hypothetical route which the defendant claimed he might have taken. The plaintiff contended his route was safer and shorter; the defendant denied these

facts. This comparison of routes affects four possible issues in the case: (1) the defendant's negligence; (2) unseaworthiness; (3) plaintiff's contributory negligence; (4) plaintiff's assumption of risk. The trial judge, after a judicious, if lengthy, exposition of the pleadings and the evidence, went on to charge the jury as follows:

> "Well, these are the issues of fact: It is for you to say whether there was grease in the passageway at the time that the plaintiff fell; whether he fell in the manner in which he did say he fell; whether the illumination was on or whether there was no illumination of that passageway.
>
> "It is the duty of the vessel, among other duties, in respect to this passageway at least, it is the burden imposed by law on the vessel, to make it seaworthy.
>
> "Now, what does seaworthy mean in this case? Seaworthy applied to this case means that that passageway must be reasonably safe for the purpose for which it was intended. Consequently, you have to determine whether it was so, or whether there were other acts of negligence which precipitated this accident.
>
> "Now, in determining liability, there can be no liability imposed on the defendant unless the plaintiff has established to your satisfaction the essential allegations of his complaint. If you find that the plaintiff has done that, then you approach another subdivision of the matter of liability, and that is whether the plaintiff was guilty of contributory negligence.
>
> "The defendant says he was. Of course, the burden is on the plaintiff to show that he was free from contributory negligence. As I recall, the plaintiff said that he had gone over this passageway before and that he had noted the grease spots. Knowing that, should he have been more careful on his return than he was?

"The defendant urges that if the plaintiff knew there were grease spots on the port side in the passageway leading to Hatch 3, why, he should have used the starboard; to which the plaintiff responds that that would not have been a wise move because the unloading was in progress to the shore, the winches were in operation and that the unobstructed passageway was on the port side.

"If you should find that the plaintiff contributed to the happening of the accident by his own negligence, that is, after having first found the defendant is liable, if you should so determine, then, from any award you might otherwise give the plaintiff, you have to deduct whatever percentage of negligence the plaintiff is guilty."

It is clear from his charge that the judge made the following assumptions of law: (1) that there was no need to charge as to the defendant's negligence, since unseaworthiness provided a route to recovery, with fewer elements to prove; (2) that the failure to light the port passageway and to keep it clean from grease was ground for recovery if it rendered it less than reasonably safe for its intended purpose; (3) that the plaintiff's alleged choice of a more dangerous route went only to reduce the amount of recovery under the doctrine of contributory negligence; (4) that assumption of risk was not apposite on these facts. I agree with all four conclusions. My brothers do not discuss the charge explicitly, but their discussion shows that they quarrel with the second conclusion and accept the others.

My brothers reverse because, as they say, the trial judge refused to charge that the plaintiff "was not entitled to any recovery if he voluntarily chose to use a passageway known by him to be unsafe and if there was another avail-

able passageway known by him to be safe." The charge actually requested was this:

> "12. Even if you should find that Mr. Palermo was hurt because the passageway on the port side of the deck housing was unsafe and that the unsafe condition caused the ship to be unseaworthy or resulted from the negligence of the Steamship Company, I charge you as a matter of law that Mr. Palermo is not entitled to any money from the defendant if there was a safe passageway on the starboard side of the deck housing which he could have used and if Mr. Palermo knew or ought to have known that fact and nevertheless voluntarily chose to use the port passageway."

This proposed instruction stated the law incorrectly and there was no error in rejecting it. First, the instruction was an attempt to introduce assumption of risk into the case. It makes no sense any other way. For if its theory was contributory negligence, it wrongly allowed the jury to defeat all recovery, instead of merely reducing it. If its theory was to provide a particular application of negligence or seaworthiness, it was confusing, for it started from the premise that the jury had already resolved these issues in favor of the plaintiff. It thus forces a compulsion of choice on the plaintiff which neither the facts nor the law justifies.

The charge is further quite objectionable in its assumption that the defendant could in no event owe any higher duty to the plaintiff than to warn him of the danger in the port passageway. The majority cite the concurring opinion in *Lynch* v. *United States*, 2 Cir., 163 F. 2d 97, 99, for the proposition that it may be negligent not to warn of the dangerous passage; but neither that case nor any other case cited to us holds that the duty of reasonable

care is always satisfied by a mere warning. Often, where the continued presence of the peril serves no important useful purpose to the defendant and the cost of removing the peril is small, a reasonable man will remove the danger, and not just warn of it. This is a perfect example of such a situation: How simple it would have been to replace the burned-out light bulbs, wipe up the grease, and prevent this accident!

Until now I have assumed with my brothers that the liability of the shipowner for unseaworthiness is identical with his duty to use reasonable care to keep the vessel reasonably safe for invitees, but of course this is not so. Seaworthiness is a higher standard, as the court below understood. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 94. The defendant would not be liable under notions of negligence for a dangerous patch of grease or burned-out bulbs until it should have discovered and repaired them, but its liability for unseaworthiness arose almost as soon as the defects occurred. *Poignant* v. *United States*, 2 Cir., 225 F. 2d 595; *Grillea* v. *United States*, 2 Cir., 232 F. 2d 919; *Williams* v. *Tide Water Associated Oil Co.*, 9 Cir., 227 F. 2d 791, certiorari denied *Tidewater Associated Oil Co.* v. *Williams*, 350 U. S. 960. The duty to keep stairs and passageways seaworthy is not satisfied by warning the users of defects and allowing them to find alternative routes. See *Troupe* v. *Chicago, Duluth & Georgian Bay Transit Co.*, 2 Cir., 234 F. 2d 253, 258.

The only case cited by my brothers in which the presence of a better alternative route defeated recovery for unseaworthiness is the unappealed lower court decision, *Manera* v. *United States*, D. C. E. D. N. Y., 124 F. Supp. 226, involving two ladders into a hold, one of which was without an upper section. The plaintiff fell off the short ladder and recovery was denied, *inter alia*, because he should have used the safer ladder. But that case reveals a critical

factual distinction: the ladder from which the plaintiff fell, while it was less safe, was nevertheless "seaworthy"; it had been necessary to remove its upper section to make room for cargo in the 'tween deck. It was in its normal condition when plaintiff injured himself by using it improperly. In the instant case the grease and burned-out lights on the port passageway were not deliberate alterations designed to make the vessel perform its function better, but were defects of no use to the ship and of great danger to its crew. See *Long* v. *Silver Line*, 2 Cir., 48 F. 2d 15.

Thus the decisive issues of fact were left to the jury under a proper and appropriate charge. Its decision for the plaintiff should stand.

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of July one thousand nine hundred and fifty-seven.

Present:

HON. CHARLES E. CLARK,
Chief Judge,

HON. J. EDWARD LUMBARD,
HON. STERRY R. WATERMAN,
Circuit Judges.

PASQUALE PALERMO,
Plaintiff-Appellee,

—v.—

LUCKENBACH STEAMSHIP CO.,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District